INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 81

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, CIO,[1] AND NUTONE, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 99–110) is reported at 243 F. 2d 593. The findings, conclusions, and order of the Board (R. 11–54) are reported at 112 NLRB 1153.

JURISDICTION

The judgment of the court below (R. 110) was entered on November 23, 1956. The petition for writ of certiorari was granted on April 1, 1957. 353 U. S. 921. The jurisdiction of this Court rests on 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

[1] Now properly United Steelworkers of America, AFL–CIO, as a result of the merger of the two parent federations in December 1955.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are reprinted in the Appendix, *infra*, p. 45.

QUESTION PRESENTED

Whether a rule prohibiting employees from distributing literature in the employer's plant, otherwise valid under the tests enunciated by this Court, becomes invalid if the employer, himself, is distributing literature setting forth his own non-coercive views concerning unionization.

STATEMENT

Following the customary proceedings under Section 10 of the Act, the Board found that the employer, NuTone, Incorporated, had engaged in a number of unfair labor practices against its employees, including unlawful interference with their organizational rights, discriminatory refusal to reinstate certain employees after an economic layoff, and unlawful assistance and support to an organization of its employees known as the NuTone Employee-Company Relations Committee (R. 44–45, 46–47). The Board prescribed appropriate remedial relief for these violations (R. 47–48). However, the Board, one member dissenting, dismissed an allegation that NuTone had committed a further violation of the Act by discriminatorily enforcing a plant rule against employee distribution of literature in the plant (R. 45–46, 49–51). The court below, while generally affirming the Board's findings and order, reversed the Board with respect to its ruling on the no-distribution rule. Since the validity of this reversal

is the sole question presented in this case, we set forth only the findings and conclusions relevant to that question.

I. THE BOARD'S FINDINGS AND CONCLUSIONS

NuTone, a New York corporation, operates a plant located on a public street in Cincinnati, Ohio, where it manufactures door chimes, fans, heaters and other electrical devices (R. 12). In the summer of 1953, United Steelworkers of America, CIO, engaged in an organizational campaign among NuTone's employees preparatory to a Board election scheduled for August 19, 1953 (R. 12). Prior to and during the organizational campaign NuTone had in effect rules forbidding its employees to engage in solicitation of any kind on company time, to post signs of any kind or to distribute any literature on company property (R. 17–18). However, NuTone itself regularly posted signs throughout the plant and distributed literature both for its own purposes and for charitable purposes or drives such as Community Chest (R. 18–19, 57, 58, 59).

When the Steelworkers' campaign got under way, NuTone posted notices reminding its employees of the foregoing rules and stating that the rules applied equally to pro-union and anti-union employee groups (R. 17–18, 58–59, 60–61). During the preelection period, the rules were uniformly applied to those employees who favored the Steelworkers and to those who opposed the Steelworkers (R. 18).

Management, however, consistent with its prior practice, did not deem itself bound by the rules which were directed to its employees, and itself distributed

to the employees in the plant eight pieces of pre-election literature (R. 18–19, 62–64, 77–80).[3] This literature, while anti-union, was free of threat of reprisal or force, or promise of benefit (*ibid.*).

The parties to the Board proceeding did not challenge the company rules relating to solicitation and distribution and both the trial examiner and the Board affirmed their legality (R. 19–20, 45).[4] The trial examiner was of the view, however, that the ban on employee distribution of literature in the plant likewise precluded management from utilizing that medium of communication, and that NuTone's distribution of anti-union literature in the plant, even though the content of that literature was not coercive, constituted a discriminatory application of the no-distribution rule, in violation of Section 8 (a) (2)

---

[3] During the same period NuTone used the mails to send ten other pieces of non-coercive anti-union material to its employees (R. 19, 61, 64–65, 89–96). This avenue of communication like distribution at company entrances was, of course, available to the employees under the company rule.

[4] Notwithstanding that literal application of the rules precluded distribution of literature on the Company parking lot situated adjacent to the plant, the complaint did not allege, nor have the parties at any time claimed, invalidity of the rules on that basis. The Trial Examiner found that the rules were "in and of themselves" valid, and the Board, noting the absence of any exception to that finding, adopted it (R. 19, 45). Assuming that a proper exception in that regard would have resulted in a finding that the extension of the no-distribution rule to the parking lot was improper (cf. *LeTourneau Company of Georgia*, 54 NLRB 1253, 1264, enforced, 324 U. S. 793), this would not resolve the basic issue here presented, namely whether NuTone's own distribution of non-coercive literature invalidated the otherwise permissible prohibition against employee distribution on working premises.

and (1) of the Act (R. 17–20).[4] The Board, one member dissenting, reversed the trial examiner in this respect (R. 45–46, 49). The Board noted that the anti-union literature distributed by NuTone was protected by Section 8 (c) of the Act, which guarantees the right to express and disseminate views, arguments and opinions in oral or printed form so long as they do not contain threats of reprisal or force or promises of benefit (R. 45–46). The Board held further that an employer's right to promulgate and enforce valid rules regulating the conduct of his employees may not be conditioned on the requirement that management itself be bound by such rules (*ibid.*). Finally, the Board concluded that the statutory protection accorded NuTone's dissemination of its non-coercive views was not forfeited because it engaged in other unfair labor practices for which a remedy had been provided (R. 46). See p. 2, *supra*.

II. THE DECISION OF THE COURT BELOW

The Court of Appeals, affirming in other respects the Board's findings of unfair labor practice and its remedial order (R. 109–110), disagreed with the

[4] The trial examiner found further support for his finding of unlawful discrimination in the circumstance that, after the defeat of the Steelworkers in the August 19 election and the elimination of that Union as a contender for the status of bargaining representative of the employees, NuTone unlawfully assisted the NuTone Employee-Company Relations Committee by, *inter alia*, permitting and assisting it to distribute literature on plant property (R. 19). As indicated above, p. 2, the Board found that this unlawful assistance was in and of itself a violation of the Act and directed its cessation (R. 46–47).

Board's conclusions on the subject of the no-distribution rule (R. 101–109). Characterizing that issue as "a close and elusive one," the court observed that its resolution turned on "the interplay of several rights, some statutory and some inherent" (R. 108, 102). The court acknowledged that these several rights—the Section 7 right of employees to engage in organizational activities free of unlawful interference; the employer's right, protected by Section 8 (c), to express and disseminate non-coercive views and opinions; and the inherent right of employers to maintain production, order, and discipline in their establishments—sometimes conflict and that the resolution of such conflict was the core of the instant case (R. 102).

Putting aside, at the outset, the impact of Section 8 (c), the court below first considered the problem merely in terms of an accommodation between the Section 7 right of employees to organize and the countervailing right of employers to maintain production, order and discipline. It observed, in accord with prevailing authority, that "absent special circumstances, discrimination, or a specific purpose to suppress self-organization," plant rules against solicitation are valid as to working time because of the obvious employer interest in maintaining production, and that, in the interest of keeping the plant clean and orderly, plant rules forbidding distribution of literature are valid even as to non-working time (R. 104). The court then noted that there was no "dispute concerning the general validity of a broad no-distribution rule like the one in effect at NuTone" (R. 105). The court reasoned, however, that since the justification

for such a rule was the employer's interest in order or discipline, NuTone's own distribution of literature while contemporaneously prohibiting such distribution by employees vitiated the reason for the rule and rendered it invalid (R. 105–106).

Having reached this conclusion solely on the basis of the interplay of the Section 7 rights of employees and the employers' proprietary interests, the court below directed its attention to Section 8 (c) which, on the court's own statement, was a vital element in that interplay (R. 106–109). The court conceded that Section 8 (c) was open to a construction which would invalidate the conclusion it had reached. Thus, Section 8 (c) expressly provides that the "dissemination" of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act * * *." Hence, the argument runs, to condition the employer's right to disseminate his views by compelling him to forfeit his otherwise valid rule against employee distribution would write into Section 8 (c) a condition not placed there by Congress and would dilute the guarantee of that section (R. 107–108).

This was the point of view, the court below noted, adopted by the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, and by Judge Swan, dissenting, in *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 646 (C. A. 2), certiorari denied, 345 U. S. 905. The court below rejected this line of reasoning, however. It held that while Section 8 (c) "wipes out the taint of discrimination which

might attach to a speech by an employer favoring one union as against another, or against any and all unions," and also "wipes out the obligation of an employer to afford affirmatively to his employees an equal opportunity with himself to distribute or solicit," it "does not wipe out the basic rule that in order to enforce a no-distribution rule against employees, the employer must have a valid reason" (R. 108). Accordingly, the court concluded that NuTone was guilty of an unfair labor practice when it prohibited its employees from distributing organizational literature on company property during non-working hours, and directed that the Board modify its order to conform to the court's opinion (R. 109).

SUMMARY OF ARGUMENT

The principles governing the right of employees to engage in union solicitation or to distribute union literature on plant property spring from "an adjustment between the undisputed right of self-organization assured to employees under the * * * Act and the equally undisputed right of employers to maintain discipline in their establishments." *National Labor Relations Board* v. *LeTourneau Company of Georgia*, 324 U. S. 793, 797–798. One of these principles, directly involved here, is that absent special circumstances or discriminatory motivation, an employer may make and enforce a broad rule prohibiting his employees from distributing literature in his plant at any time. The question presented for review in this case is whether such a rule, concededly valid on its face, becomes invalid and an unfair labor practice if

the employer contemporaneously utilizes the plant premises to distribute his own non-coercive literature concerning unionization. Resolution of this question, posed before this Court for the first time, calls for a reexamination of the nature of the conflicting employer-employee rights and the principles governing their accommodation, and calls also for an appraisal of the impact of Section 8 (c) of the Act which provides, *inter alia*, that the dissemination of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice * * *."

A. In *National Labor Relations Board* v. *Babcock & Wilcox Company*, 351 U. S. 105, this Court pointed out that in formulating the principles governing employee solicitation and distribution of literature on plant premises, the respective employer and employee rights should be scrupulously observed. "Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other" (at 112). The differing scope of the permissible rules respecting solicitation on the one hand and distribution of literature on the other reflects the application of this limiting criterion. Thus, the well-settled rule respecting solicitation is that an employer may in the normal situation forbid his employees to engage in union solicitation during working time, but that a broad prohibition banning union solicitation during non-working time is invalid. With respect to distribution of literature, however, the well-settled rule is that absent special circumstances a prohibition against employee distribution in the plant may lawfully encompass even non-working time. Implicit

in the rule governing solicitation is the premise that absent some inroad on the employer's otherwise exclusive control over his property, the employees' right to self-organization through the medium of solicitation would be substantially frustrated. Conversely, the underlying premise of the rule governing distribution is that adequate protection of the employees' organizational rights in that regard can be maintained without any corresponding impairment of the employer's property right.

This distinction flows from the fact that solicitation and distribution of literature are different organizational techniques and pose different problems for the employer and for the employees. The rights and interests of both enter into the accommodations reached. Heretofore, the difference in the scope of the respective rules has been explained largely in terms of employer interests. Thus, it has been noted that solicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the plant, raises a hazard to production even if it occurs on non-working time.

This consideration, though valid, presents only one side of the employer-employee equation and does not wholly explain the accommodations reached. For example, if the employer interests alone were controlling, a blanket proscription on employee solicitation in the plant could be justified, and the rule respecting distribution might likewise take a different form. Accord-

ingly, the employee interests involved in the respective situations must also be considered.

From the standpoint of employee interests, the drawbacks to effective solicitation when employees are away from the plant and engaged in their other varied activities has compelled the conclusion that the plant itself is uniquely appropriate for that purpose and that unless solicitation were allowed there at least during non-working time, the employees' right to utilize that medium of organization would be virtually nullified. Distribution of literature does not present that problem. The distinguishing characteristic of literature, as contrasted with oral solicitation, is that its message is reduced to permanent form and its purpose is satisfied so long as adequate opportunity exists for its distribution. For example, literature can be distributed to employees as readily when they enter or leave the plant as when they are in the plant. It is this consideration coupled with the employer's natural interest in keeping disorder in the plant to a minimum which differentiates distribution from solicitation. And since adequate avenues exist for employee distribution of literature outside the plant, there is no occasion for the employer to surrender his property right in the plant itself to provide still another avenue.

The court below overlooked this critical consideration when it assumed that "littering" was the sole reason for the no-distribution rule and that the employer by himself distributing literature in the plant vitiated the reason for the rule. A reason of at least equal importance is that adequate avenues outside the

plant are available for employee distribution. The employer's utilization of his premises for distribution of his own literature does not interfere with the employees' use of those avenues. Accordingly, since the employees' statutory right of self-organization in that regard is fully maintained, no destruction of the employer's property right is required.

B. As the court below recognized, Section 8 (c), which provides that the expression or dissemination of non-coercive views, argument, or opinion shall not constitute or be evidence of an unfair labor practice, is directly relevant here. The text and legislative history of that Section reveal that Congress disapproved of the Board's early view that the mere airing by an employer of anti-union views on plant premises constituted an unfair labor practice even though the views were non-coercive, and disapproved also of the Board's later view where the same result was reached by invoking the "captive audience" doctrine. Congress specifically indicated that Section 8 (c) was to change the law in that regard. The Board's holding here comports fully with the Congressional mandate.

The limitations of Section 8 (c) must be recognized, however. An employer's expression of his non-coercive views may not be made the basis of an unfair labor practice finding but Section 8 (c) does not exonerate the employer if there is an independent basis for such a finding. Thus, where an employer's denial of plant premises is independently discriminatory he obtains no immunity because he made a speech or distributed literature which itself falls within the Section 8 (c) immunity. On the other hand, where,

as in the instant case, the employer's expression or dissemination of his non-coercive anti-union views is the sole basis for an unfair labor practice finding, Section 8 (c) precludes such a finding.

The Board applied this principle in the *Livingston Shirt* case (107 NLRB 400) where the employer, a manufacturer, had a normal rule forbidding employee solicitation on plant premises during working time but permitting it during non-working time. The employer, however made a non-coercive, anti-union speech to the employees during working time and denied the union's request to reply under like circumstances. The Board, relying on Section 8 (c), held that the employer had not committed an unfair labor practice. The Board, however, distinguished the situation where the employer imposed "either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business [*e. g.*, a department store rule])" (107 NLRB at 409). In such a situation the employer, having unlawfully or by claim of special privilege denied employees the use of their normal avenue of communication, *i. e.*, solicitation on plant premises during non-working time, acts discriminatorily when he takes advantage of that deprivation for his own benefit. Section 8 (c) does not preclude an unfair labor practice finding in such a situation, because that finding rests not on the employer's speech but on his deprivation of an avenue of communication normally available to them.

The same logic applies in the instant case. In *Livingston,* the employees retained their normal right to solicit on plant premises during non-working time and the employer's speech during working hours in no way deprived them of that right. Hence, there was no basis for an unfair labor practice finding other than the speech itself and that Section 8 (c) forbade. So here, the employer's distribution of literature in the plant in no way foreclosed the employees' normal avenues for the distribution of their literature off the plant, and the employer's distribution itself could not under Section 8 (c) be made the basis for an unfair labor practice finding.

C. Analysis of the relevant authorities in the several courts of appeals on this issue reveals that while there are some divergent views, the authorities for the most part support the analysis here made. The Second Circuit in *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, and in *National Labor Relations Board* v. *American Tube Bending Co.*, 205 F. 2d 45, made clear that it would predicate an unfair labor practice finding on the employer's unilateral utilization of his premises for the expression of his noncoercive views concerning unionization *only* in the situation where his prohibition against employee use of that forum exceeded the normal limitations of such a prohibition. Thus, in the *American Tube* case, where the employer had a broad rule forbidding employee solicitation in the plant at all times, the Second Circuit noted that if the Board's unfair labor practice finding and order "had depended upon the [employer's] refusal, or failure, to allow [the union] to address the employees on

the property during working hours it could not stand" (205 F. 2d at 46).

The rule adopted by the Board avoids this result, and at the same time avoids the converse view which assumes that merely because certain facilities for dissemination of views are available to the employer, the identical facilities must likewise be made available to his employees. As the Board noted in the *Livingston Shirt* case, *supra,* 107 NLRB at 407, "the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use [by] both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting * * * to make the facilities of the one available to the other."

D. The principles developed in the foregoing authorities are applicable by analogy to the instant case. As already noted, distribution of literature by employees, unlike solicitation by employees, can be forbidden in the plant at any time, not only because literature which is distributed raises a hazard to the employer's interest in his production but because the purpose to be served by the distribution of literature in terms of employee interests can readily be served outside the plant. No special circumstances existed in the instant case precluding the application of this customary rule. The employees here were not prejudiced by the employer's distribution of literature on plant premises because they retained their correlative right to distribute literature through the customary

channels available to them. No unlawful discrimination arises from the fact that the employees were denied the use of plant premises for the distribution of their literature because the basic accommodation, approved by the courts, gave them no right or claim to such use in the first instance. Absent any other basis for the finding of an unfair labor practice, to posit such a finding on the mere fact that the employer has distributed non-coercive literature would be to ignore the provisions of Section 8 (c) which specifically immunize such conduct.

ARGUMENT

THE DECISION MADE BY THE BOARD IN THE INSTANT CASE IS A PROPER APPLICATION OF THE PRINCIPLES GOVERNING EMPLOYEE SOLICITATION AND DISTRIBUTION OF LITERATURE ON PLANT PROPERTY. THE CONTRARY RULING OF THE COURT BELOW SHOULD BE REVERSED

INTRODUCTORY STATEMENT

Oral solicitation and distribution of literature are traditional techniques in labor's struggle for organization and, generally speaking, fall within the ambit of activities protected by Section 7 of the Act. When employees seek to exercise these Section 7 rights on the premises of an employer, they intrude upon the right of the employer to control the use of his property and necessarily an adjustment must be made between these competing interests. The two organizational techniques do, however, differ in character and their implementation poses different problems both for the employer and the employees. The accommodation of these conflicting rights has given rise to ex-

tensive litigation as a result of which certain basic principles have been established. One of these principles, directly involved here, is that absent special circumstances or discriminatory motivation, an employer may make and enforce a broad rule prohibiting his employees from distributing union literature in his plant at any time.

Such a rule was in effect in the employer's plant in the instant case and the validity of the rule, as such, is not challenged. The question presented for review is whether such a rule becomes invalid and an unfair labor practice if the employer contemporaneously utilizes the plant premises for the distribution of his own non-coercive literature concerning unionization. This Court has not heretofore passed on the question. Hence, a reexamination of the nature of the conflicting employer-employee rights here involved is appropriate as well as a reexamination of the principles governing their accommodation. Moreover, the facts of the instant case raise for the first time before this Court an appraisal of the impact of Section 8 (c) upon this accommodation. That Section expressly provides, *inter alia*, that the dissemination of non-coercive views, argument, or opinion "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act * * *." Since it is precisely such dissemination which is the basis for the alleged invalidity of NuTone's otherwise proper no-solicitation rule, Section 8 (c) is, as the court below acknowledged (R. 106), a critical factor in the interplay of rights which must here be accommodated.

We submit that, contrary to the reasoning of the court below, a reexamination of the basic principles in this field and a proper appraisal of the impact of Section 8 (c) vindicate the conclusion of the Board that NuTone's distribution of its own non-coercive literature on plant premises in no way impaired the validity of its rule forbidding its employees to utilize the premises for that purpose. We set forth hereunder the considerations which, in our view, justify that conclusion.

A. The principles governing the accommodation of the conflicting rights and the nature of the employer and employee rights involved

As this Court long ago made clear in *National Labor Relations Board* v. *LeTourneau Company of Georgia*, 324 U. S. 793, a case arising under the Wagner Act, the rules regarding solicitation and distribution of literature on plant premises evolved out of "an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 324 U. S. at 797–798. Neither right is unlimited. "Opportunity to organize and proper discipline are both essential elements in a balanced society." *Ibid.*

Where there is no necessary conflict, neither right should be abridged. By the same token, where conflict does exist, the abridgement of either right should be kept to a minimum. This Court recently stated this principle and its underlying rationale in *National Labor Relations Board* v. *Babcock & Wilcox Company*, 351 U. S. 105, 112:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. *Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other.* [Emphasis supplied.]

The rules heretofore established in this field have respected these controlling criteria. Thus, with regard to solicitation it is well settled that an employer may in the normal situation make and enforce a rule forbidding his employees to engage in union solicitation on plant property during working time, but that a broad rule banning such activity during non-working time is invalid. *Peyton Packing Company,* 49 NLRB 828, cited with approval in *LeTourneau, supra,* 324 U. S. at 803. On the other hand, with regard to distribution of literature, it is equally well settled that under normal conditions an employer rule forbidding employee distribution of literature in the plant proper may lawfully encompass even non-working time. See *Monolith Portland Cement Co.,* 94 NLRB 1358, 1366; *Tabin-Picker & Co.,* 50 NLRB 928; *LeTourneau Company of Georgia,* 54 NLRB 1253, 1258, *et seq.; LeTourneau, supra,* 324 U. S. 797.[5]

---

[5] Where special circumstances exist, the usual rules do not apply. For example, employee solicitation can be forbidden even during non-working time where the nature of the employer's business requires such a broad limitation, *e. g.*, the selling floors of a department store. *May Department Stores Co.,* 59 NLRB 976, enforced, 154 F. 2d 533 (C. A. 8), certiorari denied, 329 U. S. 725. Conversely, as *LeTourneau* itself estab-

No special justification is required for the imposition of such a broad *no-distribution* rule as is the case where a broad *no-solicitation* rule is sought to be imposed.*

The difference in the scope of the respective rules is revealing. For implicit in the rule respecting solicitation is the premise that absent some inroad on the employer's otherwise exclusive control over his property, the employees' right to self-organization through the medium of solicitation would be substantially frustrated. The "maintenance" of the employees' Section 7 right in that regard requires a partial "destruction" of the employer's property right. See *Babcock & Wilcox,* quoted *supra,* p. 19.

---

lishes, the considerations which underlie the validity of broad rules banning employee distribution of literature in actual working areas "do not have the same force in the case of parking lots." 54 NLRB at 1261. (But see *Babcock & Wilcox*, *supra*, 351 U. S. 105, where this Court upheld the validity of a parking lot prohibition against non-employee organizers.) Lumber camps and the like, where employees are isolated from normal contacts, likewise require a relaxation of otherwise permissible restrictions inasmuch as in such cases "union organization must proceed upon the employer's premises or be seriously handicapped." *LeTourneau, supra,* 324 U. S. at 799; *National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147, 150–151 (C. A. 6). Finally, where it is shown that the imposition or enforcement of restrictive rules in this field flow not from the employer's right to protect his legitimate property interests, but rather from his desire to obstruct the employees' statutory right of self-organization, the immunity otherwise accorded him in this regard is forfeited. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 230, 233; *Babcock & Wilcox, supra,* 351 U. S. at 111, n. 4.

* See preceding note.

On the other hand, the underlying premise of the no-distribution rule is that adequate protection of the employees' organizational rights in that regard can be assured without any corresponding "destruction" of the employer's property right.

The distinction is not fortuitous. It springs from the fact that solicitation and distribution of literature are different organizational techniques and their implementation poses different problems both for the employer and for the employees. Heretofore, the difference in result has been explained largely in terms of the employer's interests. Thus it has been noted that solicitation, being oral in nature, impinges upon the employer's interests only to the extent that it occurs on working time, whereas distribution of literature, because it carries the potential of littering the plant, raises a hazard to production whether it occurs on working time or non-working time. See authorities cited *supra*, p. 19.

The validity of this consideration cannot be gainsaid. But because it presents only one side of the employer-employee equation, it does not wholly resolve the problem. For example, if the employer interests alone were controlling, solicitation on plant premises could properly be denied altogether for no one would deny that the strong feelings frequently engendered by union solicitation inevitably carry over to some extent from non-working time to working time. And, on the other hand, the employer's unquestioned right to make reasonable regulations governing the manner and volume of literature distribution in the plant if such distribution were allowed would substantially

minimize any hazard to production raised thereby and, *pro tanto*, would abate the need for complete exclusion.

Logic and authority dictate, therefore, that we look also to the countervailing employee interests involved in the respective situations. The first requirement for an employee seeking to solicit his fellow employees is that he find a time and place appropriate for such solicitation. In *Republic Aviation Corporation*, 51 NLRB 1186, 1195, the Board pointed out that in the situation there presented, the free time of employees on plant property was "the very time and place uniquely appropriate * * * therefor" (quoted with apparent approval at 324 U. S. 801, n. 6). This is true, moreover, whether the plant involved is located, as in *Republic Aviation*, in a somewhat remote location or, as here, in the heart of a large city. In either case, the difficulty of drawing employees aside when they are hurrying to or from work, or when they are engaged in other activities away from the plant, is obvious. Accordingly, unless the right of employees to engage in effective solicitation is to be virtually nullified, at least a minimum intrusion upon employer property rights is required. The countervailing interest of the employer is afforded protection by restricting employee solicitation to non-working time.

This is not the case where distribution of literature is involved. The distinguishing characteristic of literature as contrasted with oral solicitation is that its message is of a permanent nature and that it is designed to be retained by the recipient for his perusal at his convenience. Hence, its purpose is satisfied so

long as adequate opportunity exists for its distribution. Access to the plant itself is not required for effective distribution. Indeed, in addition to the use of the mails or other forms of delivery, a pamphlet or circular can be handed to an employee as readily when he enters or leaves the plant as when he is in the plant. It is this consideration coupled with the employer's natural interest in keeping disorder in his plant to a minimum which differentiates distribution from solicitation. The Board and the courts quite reasonably concluded, therefore, that since adequate avenues exist for employee distribution of literature outside the plant, there was no occasion for the employer to surrender his normal property right with respect to the plant proper to provide still another.[7]

The foregoing considerations, we believe, expose the error in the view advanced by the Steelworkers and adopted by the court below (R. 106), that where an employer distributes his own literature in the plant he thereby forfeits his right to impose a no-distribution rule against the employees because he has by his own conduct vitiated the reason for the rule. This might well be true if littering were the sole reason for the rule, as Steelworkers and the court

---

[7] As already noted (p. 19, n. 5), these considerations "do not have the same force in the case of parking lots." Since production is normally unaffected by parking lot activity, the employer's property interest is correspondingly weaker when measured against the employee right of distribution. The accommodation reached in parking lot cases, therefore, is understandably at variance with the normal distribution rule. But even in parking lots, the employer may normally prohibit a *non-employee* from distributing union literature. *Babcock & Wilcox*, *supra*.

below assume.* But that is not the case. As we have shown, a reason of at least equal importance is that adequate avenues for distribution of literature by employees exist outside the plant. The employer's utilization of his premises for distribution of his own literature does not interfere with the employees' use of those avenues. Accordingly, since the employees' statutory right of self-organization is fully maintained, no "destruction" of the employer's normal property right is required. Cf. *Babcock & Wilcox, supra.*

The same considerations which militate against the view that the employer is required because of his own distribution of literature on plant premises to grant the use of those premises to the employees likewise refute the ancillary argument that he is required at the very least not to use the premises himself if he has denied that use to the employees. We submit that the purported distinction is without substance. The net of both positions is that the employer, here Nu-Tone, must forfeit its own right to use its premises for distribution of literature unless it grants the employees the same facilities. In either case, the employer is required to surrender, at least in part, his property right even though the employees' statutory right has not been impaired.

---

*Even if this proposition were correct it does not necessarily follow that because an employer may have elected to disregard his own best interests in the care of his property he must permit others to exercise the same liberty. As the Board noted in the instant case (R. 45), "Management prerogative certainly extends far enough so as to permit an employer to make rules that do not bind himself."

B. The impact of Section 8 (c)

As already stated, we believe that NuTone's utilization of its premises for the distribution of literature did not invalidate its rule, otherwise appropriate, forbidding its employees to utilize its premises for that purpose. This conclusion follows, in our view, from the nature of the employer-employee rights subject to accommodation and from the principles governing that accommodation. As already noted, however, Section 8 (c) of the Act is directly relevant here and the impact of that section upon the accommodation here reached must be appraised. That appraisal, we submit, confirms the correctness of the Board's conclusion.

It is undisputed that the literature distributed by NuTone, while anti-union, was free of threat of reprisal or force or promise of benefit. On its face, therefore, it fell within the coverage of Section 8 (c) of the Act which provides that—

> The expressing of any views, argument, or opinion, *or the dissemination thereof*, whether in written, printed, graphic, or visual, form shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit. [Emphasis supplied.]

The legislative history of that section[*] shows clearly that Congress contemplated its application, *inter alia*, to situations like that presented in the instant case.

---

[*] Summarized in large part in *National Labor Relations Board v. F. W. Woolworth Co.*, 214 F. 2d 78, 79 (C. A. 6).

The Senate Committee which reported the bill embodying this provision, stated (S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 23–24, reprinted in Leg. Hist. 429–430)[10] that its purpose was to

> insure both to employers and labor organizations full freedom to express their [non-coercive] views to employees on labor matters * * *. The Supreme Court in *Thomas* v. *Collins* (323 U. S. 516) held contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of the *American Tube Bending* case (134 F. (2d) 993). The Board has placed a limited construction upon these decisions by holding such speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, even though severable or unrelated (*Monumental Life Insurance*, 69 N. L. R. B. 247), or if the speech was made in the plant on working time (*Clark Brothers*, 70 N. L. R. B. 802). The committee believes these decisons to be too restrictive and, in this section, provides that if, under all the circumstances, there is neither an expressed or implied threat of reprisal, force, or offer of benefit, the Board shall not predicate any finding of unfair labor practice upon the statement.[11]

As the foregoing excerpt shows, Congress disapproved of the view taken by the Board in the *Ameri-*

[10] The abbreviation "Leg. Hist." refers to Legislative History of the Labor Management Relations Act, 1947 (Gov't Print. Off., 1948).

[11] See also H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 8, 33, Leg. Hist. 299, 324; H. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess., p. 45, Leg. Hist. 549.

can Tube case (44 NLRB 121) that the mere airing by an employer of his anti-union views on company premises constituted an unfair labor practice even though the views were free of coercive content, and disapproved also of the Board's later view in the *Clark Brothers* case where the Board reached the same result by invoking the "captive audience" doctrine. Indeed, Congress specifically indicated that Section 8 (c) was to change the law in that regard. The Board's holding in the instant case comports fully, therefore, with the statutory text and its legislative history.[12]

This does not mean, nor may Congress be fairly taken to have intended, that Section 8 (c) be given an overriding significance without regard to other provisions of the Act. An employer's expression of his non-coercive views may not be made the basis for an unfair labor practice finding, but Section 8 (c) plainly does not exonerate the employer if there is an independent basis for an unfair labor practice in that regard. To cite an extreme example, an employer may

[12] The text and legislative history of Section 8 (c) likewise vindicate the Board's rejection of Steelworkers' claim urged before the Board and in the court below that NuTone's commission of other and independent unfair labor practices before and after the critical election here involved converted its otherwise lawful no-solicitation and non-distribution rules, impartially enforced as between rival employee groups during the election period, into an unfair labor practice. As already noted (*supra*, p. 2), the Board provided appropriate relief for these independent unfair labor practices in its remedial order and insured against their repetition. The court below did not rely or pass upon the Steelworkers' claim in this regard and any question arising therefrom, even if otherwise deemed appropriate for review, is not presented here.

not be exonerated from the sanctions of the Act for discharging an employee for union affiliation because in connection with that discharge he made a statement, protected by Section 8 (c), indicating his opposition to unionization. So here, Section 8 (c) would not exonerate the employer from an unfair labor practice finding notwithstanding the protected nature of his statement, if his denial of plant premises to the employees were independently discriminatory or accompanied by circumstances from which the Board could fairly draw an inference of discriminatory motive. Where, however, as in the instant case, the employer's expression or dissemination of his anti-union views is the sole basis for the unfair labor practice finding, Section 8 (c) precludes such a finding just as it would preclude a finding of unlawful discharge in the example cited if the employer's noncoercive anti-union statement were the sole basis for that finding.

The Board's holding in *Livingston Shirt Corp.*, 107 NLRB 400, relied upon by the Board in the instant case (R. 46), illustrates this point. In that case the employer had a manufacturing plant and under the customary rule applicable in such a situation, the employees had the right to engage in union solicitation during their non-working time. However, the employer was charged with an unfair labor practice because he made an anti-union but non-coercive speech to his employees on plant premises during working time and denied the union an opportunity to reply under like circumstances. As in the instant case the Board there found, one member dissenting, that no

unfair labor practice had been committed. Two Board members in the principal opinion in that case emphasized that in enacting Section 8 (c) Congress made it clear that employers should be free to influence their employees by expressing their noncoercive views and opinions (at 405–406). Furthermore, they noted that nothing in Section 8 (c) or in its legislative history suggests that Congress intended "to restrict an employer in the use of his own premises for the purpose of airing his views" or that his right to speak thereon, absent unusual circumstances, carries with it an obligation to provide an equal opportunity to reply (at 406).[13]

The Board, however, emphasized the limited scope of its holding. Thus, the Board explained that the situation was different where the employer imposed "either an unlawful broad no-solicitation rule (prohibiting union access to company premises on other than working time) or a privileged no-solicitation rule (broad, but not unlawful because of the character of the business [*e. g.*, a department store rule]) * * *" (at 409). In such a case the employer, having unlawfully or by claim of privilege, based on special circum-

[13] In his concurring opinion in *Livingston*, Board Member Peterson, the fourth member of the four-man Board which decided *Livingston* and a signatory to the decision in the instant case, agreed with the result reached. His agreement, however, was posited not on Section 8 (c) which he felt was not an issue in the case, but merely on the ground that the employer's refusal to devote his time and property to the union for a reply speech did not under the facts of that case constitute a discriminatory denial of access to the union (107 NLRB at 409–410). The parallel facts in the instant case would, as the precedent section shows, dictate a parallel result.

stances, denied employees the use of their normal right of communication, *i. e.,* solicitation on plant premises during non-working time, acts discriminatorily when he takes advantage of that avenue for his own benefit. The finding of unfair labor practice in such a situation is not precluded by Section 8 (c) because it does not rest on the employer's speech but on the fact that he has deprived the employees of an avenue of communication normally available to them.

The application of the foregoing rationale to the instant case is clear. In *Livingston,* the employees retained their normal right to solicit on plant premises during their non-working hours. The speech of the employer during working hours in no way deprived them of that right. Hence, no basis existed for a finding of unfair labor practice other than the speech itself and that Section 8 (c) forbade. So in the instant case the employer's distribution of literature in the plant in no way deprived the employees of their normal avenues for distribution of literature and the employer's distribution itself could not under Section 8 (c) be utilized as the basis for an unfair labor practice finding.

Steelworkers urge, however, that there is no difference in ultimate result between the situation where the employer excludes pro-union group propaganda on plant premises and allows an anti-union group or some third party to air its views on those premises, and the situation where the employer excludes pro-union propaganda and himself airs anti-union views. Since the employer's action in the first situation is concededly an unfair labor practice, Steelworkers ar-

gues that his action in the second situation must likewise be an unfair labor practice.

The argument does not withstand analysis. Section 8 (c), in terms, precludes the Board from basing an unfair labor practice finding upon an employer's expression or dissemination of his union views, absent threat of reprisal or force or promise of benefit. The fact that an employer's views may, because of his economic position, carry an impact far beyond its mere logic or persuasiveness is a consideration which is specifically foreclosed by Section 8 (c), if not by the First Amendment itself. See *National Labor Relations Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78, 79–80 (C. A. 6). However, the fact that Section 8 (c) confers this immunity upon the employer does not give him a license to utilize his control over his property discriminatorily as between rival groups. Here the question of free speech is not involved, whether on the part of the employer or on the part of the employees. What the Act condemns in such a situation is the fact that the employer has given direct economic assistance to one rival union group and withheld it from another. Such conduct is expressly proscribed by Section 8 (a) (1) and (2) of the Act.

C. The relevant authorities

The impact of Section 8 (c) upon the accommodation of employer and employee rights in the matter of solicitation and distribution of literature on plant premises has given rise to divergent views in the courts of appeals. See, in addition to the instant case, *Bonwit Teller, Inc.* v. *National Labor Relations*

Board, 197 F. 2d 640 (C. A. 2), certiorari denied, 345 U. S. 905; *National Labor Relations Board* v. *American Tube Bending Co.,* 205 F. 2d 45 (C. A. 2); *National Labor Relations Board* v. *F. W. Woolworth Co.,* 214 F. 2d 78 (C. A. 6). Against the background of the principles already set forth, the validity of the several views can now be appraised.

Bonwit Teller, supra, was the first case to arise before the courts dealing with the kind of problem here presented. In that case the Board had given consideration to the problem whether an employer who, as did NuTone here, utilized plant premises during an organizational campaign for the purpose of communicating his views concerning unionization to the employees was obliged to accord a similar opportunity to the union. Bonwit Teller had in effect a rule forbidding union solicitation on the selling floors of its department store. Because it was a department store, Bonwit Teller availed itself of the special privilege of extending its no-solicitation rule to non-working as well as to working time. Nevertheless, despite the existence and enforcement of this broad rule, Bonwit Teller utilized its premises and working time to campaign against the union and denied the union an opportunity to reply under the same circumstances. The Board held, one member dissenting, that in denying the union request, Bonwit Teller violated Section 8 (a) (1) of the Act. 96 NLRB 608.

Noting that Bonwit Teller had availed itself of the special privilege granted department stores to ban union solicitation even on non working time, thereby imposing upon the employees "a practical disadvan-

tage . . . not sanctioned in other types of business operations," the Board held that the exercise of this "special privilege" gave rise to an obligation not to abuse that privilege by denying the union a like forum (at 612). The Board noted further that in its view the right of employees to select or reject representation by a labor organization "necessarily encompasses the right to hear both sides of the situation under circumstances which reasonably approximate equality" (*ibid.*). The Board recognized that this "equality of opportunity" doctrine would not require an employer "under any and all circumstances" to accord to a union the use of its plant premises as a union forum. What circumstances would invoke such a requirement would have to be determined "on a case-to-case" basis. The Board concluded, however, that under the special circumstances of the *Bonwit Teller* case where a broad no-solicitation rule had deprived the employees of their customary right to solicit on plant premises during their non-working time, equality of opportunity was denied by denial of the union request (*ibid.*). In answer to the dissenting member's contention that its conclusion did violence to the free speech guarantee of Section 8 (c), the Board pointed out that it did "not proscribe, nor find illegal what the Respondent said, or the manner in which it assembled its audience. We are concerned with *what the Respondent refused to do*" (Emphasis in original) (at 615). Accordingly, the Board directed Bonwit Teller to cease and desist from making anti-union speeches to the employees on plant premises during working time, unless it accorded the

union, upon reasonable request, a similar opportunity (at 615).[14]

Bonwit Teller sought review of the Board's decision and order in the Court of Appeals for the Second Circuit. That court, Judge Swan dissenting in part, agreed with the Board that Bonwit Teller had violated Section 8 (a) (1) of the Act by denying the union's request that it be granted the use of the employer's premises to reply to the employer's speech. 197 F. 2d 640. Like the Board, the Second Circuit predicated its holding on the narrow ground that Bonwit Teller had chosen to avail itself of the special privilege accorded department stores to ban employee solicitation even on non-working time, and, having done so, it was required to abstain from campaigning against the union on the same premises to which the employees were denied their normal access (at 645). However, the Second Circuit disagreed with the Board that the equality of opportunity doctrine required that Bonwit Teller accord the union the use of plant premises for a speech in reply to the employer's anti-union address. Pointing out that Bonwit

[14] Notwithstanding that the Board's *Bonwit Teller* decision turned with respect to both its facts and rationale on the particular circumstances of a department store which enforced a broad no-solicitation rule, the Board subsequently applied the so-called "*Bonwit Teller* doctrine" to cases where these significant factors were not present. See, for example, *Metropolitan Auto Parts, Inc.*, 99 NLRB 401; *American Tube Bending Co.*, 102 NLRB 735. In *Livingston Shirt Co.*, already discussed, pp. 28–30, the Board, in reliance, *inter alia*, on the Second Circuit's decisions in the *Bonwit Teller* and *American Tube* decisions, recognized the limitations of the views it had expressed in *Bonwit Teller*.

Teller's violation lay in its discriminatory application of a broad no-solicitation rule, specially invoked because it was a department store, the court said (at 646):

> If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time [Bonwit Teller] made an anti-union speech. Nothing in the Act nor in reason compels such "an eye for an eye, tooth for a tooth" result so long as the avenues of communication are kept open to both sides.[15]

The Second Circuit later made its views even more explicit in the *American Tube Bending* case, *supra*, 205 F. 2d 45 (C. A. 2). There the employer, a manufacturer, promulgated and enforced a rule which not only enjoined employee solicitation on company property during working time, which was its right, but without any special justification therefor extended the prohibition to non-working time. Against this background, the employer made a non-coercive speech against the union on plant premises and denied the union a right to reply under the same circumstances.

---

[15] Judge Swan, dissenting in part, felt that Section 8 (c) precluded a finding of unfair labor practice since in his view Congress intended by Section 8 (c) that the employer have the right to make a non-coercive anti-union speech on company time and property without any qualification predicated on the existence of a no-solicitation rule. As we show *infra*, p. 39, this was the view taken by Judge Allen in the principal opinion, in the *Woolworth* case. The majority in *Bonwit Teller* disagreed with Judge Swan, taking the position that "neither Section 8 (c) nor any issue of 'employer free speech' is involved in this case" (197 F. 2d at 645). See discussion *infra*, pp. 38–39.

The Board held that in the circumstances the employer's failure to afford the union such an opportunity constituted unlawful discrimination and ordered the employer to refrain from discriminatorily applying its no-solicitation rule. Judge Learned Hand, writing the principal opinion for the court, said (205 F. 2d at 46):

> Our decision in *Bonwit Teller, Inc.* v. *N. L. R. B.*, 2 Cir., 197 F. 2d 640, rules the case at bar. There we said that it was an unfair labor practice for the employer to exercise his privilege under § 8 (c) of addressing his employees on the premises and arguing against the formation of a union if he imposes a "no-solicitation" rule against union agitation on the premises. However, we held that, since the employer operated a number of retail stores in New York and elsewhere, it was lawful (as indeed the Board conceded) for such an employer to forbid solicitation at any time upon the premises. That was an exception to the general duty to allow solicitation on the premises in non-working hours, that the Supreme Court in *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372, recognized that the Board might impose in factories and the like. We rested our decision wholly upon the exception and reversed that part of the Board's order that had held it an unfair labor practice for an employer to address his employees on the premises during working hours, where he had refused to allow the representative of the union an equal privilege.
>
> *If therefore the Board's order in the case at bar had depended upon the respondent's re-*

> *fusal, or failure; to allow [the union] to address the employees during working hours it could not stand.* On the other hand, since the respondent refused to allow any solicitation on the premises during nonworking hours, that was in itself an unfair labor practice, for it did not operate a retail store; and it was an added unfair practice for it to address the employees, while such a rule was in force. [Emphasis supplied.]

We submit that the doctrine enunciated in the foregoing cases pays due deference to the accommodation of conflicting employer and employee rights defined in the *LeTourneau* and *Babcock & Wilcox* cases, and to the immunity vouchsafed by Section 8 (c). As already pointed out, the underlying basis of the normal no-solicitation rule which limits the restriction of employee activity in that regard to working time only is that employees must have the right to solicit on non-working time if their statutory right to organize in that regard is to be effectuated. No more than that is required, however, to balance the countervailing right of the employer. All the normal means of communication remain available to the respective parties. As the Board said in the *Livingston Shirt* case, *supra*, 107 NLRB at 406–407:

> * * * an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees * * * there remains open [to the union] all the customary means for communicating with employees * * *. We believe that the equality of opportunity which the

> parties have a right to enjoy is that which comes from the lawful use [by] both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting * * * to make the facilities of the one available to the other."[16]

Accordingly, where a valid accommodation has been reached—in the case of solicitation, a rule enjoining employee solicitation during working time but permitting solicitation during non-working time—the employer is merely exercising his countervailing right when he utilizes plant premises to make an anti-union speech. So long as that speech is non-coercive, Section 8 (c) precludes a finding of unfair labor practice. An order based on such an unfair labor practice finding "could not stand." *American Tube, supra,* 205 F. 2d at 46. Where, however, an employer without justification therefor imposes a broad no-solicitation rule banning solicitation even on non-working time or where, as in the case of a store, an employer avails himself of the special privilege of imposing such a broad ban, it is an unfair labor practice for the employer to address his employees during working hours and to deny the union an equal privilege. In such a situation, the equality of opportunity which is the premise of the accommodation no longer exists and the effect of the employer's action is to work a discriminatory preference

[16] The Board here noted that the contrary view stemmed from the "captive audience" concept underlying *Clark Brothers Co., Inc.*, 70 NLRB 802, a decision which was expressly repudiated by Congress and was a motivating factor leading to the enactment of Section 8 (c). See pp. 26–27, *supra.*

at the expense of the employees. Section 8 (c) affords the employer no immunity here, for the vice lies not in the employer's speech but in the fact that he has deprived the employees of their normal right to use plant premises for solicitation during working hours and has then taken advantage of that deprivation for his own anti-union purposes.

The failure to recognize the proper limitations of the Section 8 (c) immunity gave rise to difficulties in the Sixth Circuit's disposition of the *Woolworth* case, *supra,* 214 F. 2d 78. In that case, as in *Bonwit Teller,* the employer, a department store, had in effect a broad rule banning employee solicitation on plant premises at all times. As in *Bonwit Teller* also, the employer assembled the employees on plant premises during working time to listen to his views concerning unionization and denied the union a right to reply under the same circumstances. The Board found that this action constituted a violation of the Act. The Sixth Circuit reversed the Board in a split opinion. Judge Allen writing the principal opinion adopted the view of dissenting Judge Swan in the *Bonwit Teller* case (*supra,* n. 15) that "Section 8 (c) has direct and controlling application and that a no-solicitation rule cannot cut down the rights given the employer under Section 8 (c)" (214 F. 2d at 81). Judge Miller concurred but relied on the fact that the portion of Woolworth's no-solicitation "rule pertaining to non-working time was * * * not enforced. That portion of the rule which was enforced was a valid regulation" (at 84). Accordingly, applying the rule of law laid down in the Second Circuit's *Bonwit*

Teller and *American Tube* decisions and in the Board's *Livingston Shirt* decision, Judge Miller concluded that no violation had occurred. Judge McAllister, dissenting, took the view of the facts taken by the Board and by Judge Allen, namely, that the no-solicitation rule was applied to non-working as well as working time. On this view of the facts, Judge McAllister, applying the same authorities applied by Judge Miller, concluded that the employer had committed an unfair labor practice.

In sum, then, two of the judges in *Woolworth*, though seeing the facts differently, adopted the view of Section 8 (c) set forth by the Second Circuit in *Bonwit Teller* and *American Tube* and by the Board in *Livingston Shirt*. The contrary view, adopted only by Judge Allen,[17] which gives Section 8 (c) a controlling significance overlooks in our judgment the nature of the accommodation which underlies no-solictation and no-distribution rules in the first instance.

D. The application of the foregoing principles to the instant case

The prineiples developed in the foregoing authorities are applicable by analogy to the instant case. For while the basic considerations entering into the accommodation of employer and employee rights respecting solicitation differ somewhat from those respecting distribution of literature because of the

[17] In characterizing the latter view as "the one taken by the Court of Appeals for the Sixth Circuit" (R. 108), the court below overlooked the limitations of Judge Miller's concurring opinion.

nature of the respective media (See Section A, *supra*), the underlying principle governing their accommodation is the same, namely, that the accommodation between the two conflicting rights "be obtained * * * with as little destruction of the one as is consistent with the maintenance of the other." *Babcock & Wilcox, supra*, 351 U. S. 105, 112.

As already noted, distribution of literature by employees, unlike solicitation by employees, can be forbidden in the plant at any time, not only because such distribution impinges upon the employer's legitimate interests in maintaining plant discipline and efficiency, but because the purpose served by the distribution of literature in terms of employee interests can readily be served outside the plant. The validity of a broad no-distribution rule absent special circumstances is therefore well settled.

No special circumstances existed in the instant case. The facts summarized *supra*, pp. 3–4, reveal that NuTone is a typical manufacturing plant located on a public street in a metropolitan city. No problem of access was involved. Union literature could be, and was, readily distributed to NuTone's employees. The usual avenues available to the union or to the employees for such distribution, *e. g.*, distribution at plant gates, distribution by mail, distribution to the employees at their homes or at the union hall, were in no way foreclosed.[18] In view of these circumstances

[18] The adequacy of these modes of distribution is at least suggested by the fact that neither Steelworkers nor the employees ever asked NuTone for permission to distribute literature on plant premises.

Steelworkers concedes the propriety of NuTone's broad distribution rule as such.

Accordingly, the situation here is no different in essence from the situation in *Livingston Shirt* where a valid no-solicitation rule was in effect or the situation hypothesized in *Bonwit Teller* and *American Tube* if the invalid extensions of the no-solicitation rules there had been abandoned. In the latter situations the employees are not prejudiced by the employer's speech on plant premises because they retain their correlative right to solicit on plant premises during non-working time. In the instant case the employees are not prejudiced by the employer's distribution of literature on plant premises because they retain their correlative right to distribute literature through the customary channels normally available to them. No unlawful discrimination arises from the fact that the employees were denied the use of plant premises for the distribution of their literature because the basic accommodation, approved by the courts, gave them no right or claim to such use in the first instance.[19]

[19] The error of the court below, we believe, arises from its failure to perceive this distinction. So far as appears, the court below failed to attach any significance to the critical fact that adequate avenues for employee distribution of literature existed off plant premises whereby the employees could effectively exercise their statutory rights in that regard. Viewing the case as one where only plant premises were available for effective distribution of literature by employees, a prohibition on such use where the employer himself utilized those premises would obviously be an unlawful discrimination. See discussion *supra*, p. 19, note 5.

It follows, we believe, that just as in the typical solicitation case where a properly limited rule is in effect, an employer does not commit an unfair labor practice by utilizing his own premises for a non-coercive speech, so in the instant case he does not commit an unfair labor practice by utilizing his own premises for the distribution of non-coercive literature. In both cases the employer is merely using an avenue of communication normally and naturally available to him, and to the extent that the avenue of communication is proscribed to the employees, that proscription is the product of a valid adjustment already made by the applicable no-solicitation or no-distribution rule, as the case may be. No illegal or unduly broad proscription having been imposed by the employer, he incurs no special obligation either to forfeit his normal rights or to compensate the employees in some manner because he exercises them. And absent any other ground for the finding of an unfair labor practice, to posit such a finding on the mere fact that the employer has distributed non-coercive literature would be to flout the Section 8 (c) provisions which specifically immunize such conduct.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed to the extent that it requires modification of the Board order by incorporating a provision relating to Nu-

Tone's enforcement of the no-solicitation and no-distribution rules.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
ARNOLD ORDMAN,
Attorney,
National Labor Relations Board.

I have authorized the filing of this brief.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1957

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

U. S. GOVERNMENT PRINTING OFFICE: 1937